

April 10, 2012

Philip D. Kohn  
Rutan & Tucker, LLP  
611 Anton Blvd., Suite 1400  
Costa Mesa, CA 92626

Re: Your Request for Informal Assistance  
**Our File No. I-12-038**

Dear Mr. Kohn:

This letter responds to your request for advice on behalf of Councilmember Elizabeth Pearson regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented in your request. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct and all material facts have been provided.

Because your question is general in nature and you do not refer to any specific decision we are treating your request as one for informal assistance.<sup>2</sup>

### QUESTION

Does Councilmember Pearson have a conflict under the Act that would prevent her from participating in decisions related to the Village Entrance Project Site?

### CONCLUSION

We do not have enough information about a proposed governmental decision to make a determination regarding the material financial effects of the decision. Councilmember Pearson

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

will have a conflict of interest only if the financial effects of the decision reach the materiality level identified below.

## **FACTS**

Councilmember Elizabeth Pearson is an elected member of the Laguna Beach City Council. The City of Laguna Beach owns approximately 4.5 acres of land on the easterly side of Laguna Canyon Road and Forest Avenue that is generally referred to as the Village Entrance Project site (“the project site”). The site lies within the Laguna Beach Downtown Specific Plan area and is zoned Civic Arts District. This area includes City Hall, the Community/Senior Center and The Laguna Playhouse, among other locations. The project site currently is, and historically has been, improved and used for public and City employee surface parking lots and for City maintenance yard purposes, including storage of vehicles, equipment and material, incidental buildings and trailers for office space, and a sewage lift station. The City’s plan is to repurpose the site to create an “urban linear park” along the adjoining streets to enhance and extend pedestrian activity in the downtown area, constructing a multi-level public parking structure to add needed public parking spaces in the downtown area, and to house some City offices, a meeting room, public restrooms, and storage and maintenance needs.

The City is the applicant for the proposed public project. No project design has been approved to date. Options for a proposed project, including financing alternatives, have been under discussion in the community for several years. The proposed project has City-wide familiarity and visibility and is of City-wide concern. In June of 2008, the Laguna Beach Planning Commission certified an Environmental Impact Report for the Village Entrance Project. Next steps for the City are anticipated to include selection of a preferred project, project design, entitlement needs, financing decisions, and construction-related matters (e.g., phasing and timetable).

Councilmember Pearson is the Director of Development for The Laguna Playhouse, a 501(c)(3) nonprofit organization. The Laguna Playhouse leases its space from the City, and is situated within 500 feet of the project site. The EIR for the Village Entrance Project did not identify any significant effects of the project on The Laguna Playhouse. As the Director of Development, Councilmember Pearson is paid an annual salary in excess of \$500 and is generally responsible for overseeing marketing and fundraising activities benefiting The Laguna Playhouse. The gross annual receipts of The Laguna Playhouse exceed \$1,000,000 but are less than \$10,000,000.

## **ANALYSIS**

The Act’s conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a “financial interest.” (Section 87100.) Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material

financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's economic interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

### **Steps One and Two: Is Councilmember Pearson a Public Official Making, Participating in Making, or Influencing a Governmental Decision?**

As a member of the Laguna Beach City Council, Councilmember Pearson is a public official under the Act. (Section 82048.) As a city council member, she will be called upon to make decisions related to the project site and its future development. Therefore, she will be making, participating in making, or otherwise using her official position to influence a governmental decision.

### **Step Three: What are Councilmember Pearson's Economic Interests?**

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.)

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).)
- An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the "personal financial effects" rule. (Section 87103, Regulation 18703.5.)

You have identified that Councilmember Pearson is the Director of Development for the Laguna Playhouse. She has an interest in the Laguna Playhouse as a source of income.

**Step Four: Are Councilmember Pearson's Economic Interests Directly or Indirectly Involved in the Governmental Decisions?**

Regulation 18704(a) provides:

“In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. If a public official's economic interest is not directly involved in a governmental decision, it is indirectly involved.”

*Sources of Income and Business Entities:*

For governmental decisions that affect sources of income, the standards set forth in Regulation 18704.1(a) apply. Regulation 18704.1(a) states:

“(a) A person, including business entities, sources of income and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Based on the above, the Laguna Playhouse is not directly involved in the decisions. It is therefore indirectly involved.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on Councilmember Pearson's economic interests?**

When a non-profit entity that is a source of income to a public official is indirectly involved in a governmental decision, the appropriate materiality standard is found in Regulation 18705.3(b)(2). The particular materiality standard to apply depends on the size of the non-profit entity; you stated that the gross annual receipts of the Laguna Playhouse are greater than \$1,000,000 and less than \$10,000,000. Therefore, Regulation 18705.3(b)(2)(D) applies. In this case, the effect of the decision is material if:

“(i) The decision will result in an increase or decrease of the entity’s gross annual receipts for a fiscal year in the amount of \$ 100,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$ 25,000 or more.

(iii) The decision will result in an increase or decrease in the value of the entity’s assets or liabilities in the amount of \$ 100,000 or more.”

You have identified that this is the materiality standard that applies and you stated the result “would be dependent on the facts and circumstances associated with the nature of any proposed future decision.” We have no further guidance to provide because, like you, we do not know what the future decisions are and how they might affect the Laguna Playhouse. If, in the future, there is a decision before the council that is reasonably foreseeable to have the above affect on the Laguna Playhouse, you are welcome to either write in again, or apply the applicable standards in making a determination.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Heather M. Rowan  
Counsel, Legal Division

HMR:jgl